JD(SF)-58-04
San Francisco, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

GUARDSMARK, LLC

and

Cases 20-CA-31495-1
20-CA-31573-1

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 24/7; JEE VENISH, an Individual

Kathleen Schneider and John Ontiveros, Attys.,
San Francisco, CA, for the General Counsel.
William Dougherty and Edward Young, Attys.,
Memphis, TN, for the Respondent.
Antonio Ruiz, Atty., Oakland, CA, for the
Charging Party.

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing in this matter was held before me in San Francisco, California on April 29 and 30, 2004. The charge in Case 20-CA-1495-1 was filed on September 25, 2003 by Jee Venish, an Individual. The charge in Case 20-CA-31573-1 was filed by Service Employees International Union, Local 24/7 (Union) on November 16, 2003. On January 26, 2004, following the issuance of separate complaints, the Regional Director for Region 20 of the National Labor Relations Board (Board) issued an order consolidating the aforementioned cases. The complaints allege violations by Guardsmark, LLC (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (Act). The Respondent, in its answers to the complaints, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (General Counsel) and counsel for the Respondent.

Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent is a Delaware corporation engaged in the business of providing uniformed security personnel to commercial entities, with its headquarters and principle place of business in New York, New York, and an office and place of business located in San Francisco, California. In the course and conduct of its business operations, the Respondent performs services valued in excess of $50,000 directly to customers outside the State of California, and purchases and receives goods and materials valued in excess of $5,000 which originate outside the State of California. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. Issues

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(1) of the Act by maintaining written policies that restrict employees from engaging in activities protected by the Act, and whether the Respondent has violated Section 8(a)(1) and (3) of the Act by removing an employee from a job.

B. Facts

The Respondent is a nationwide employer that provides uniformed guard services to customers. The Respondent provides all its uniformed personnel with a comprehensive employee handbook consisting of 211 pages. Among the rules and policies contained in the handbook are the following:

> GENERAL ORDERS, Paragraph 5 (page 17): While on duty you must follow the chain of command and report only to your immediate supervisor. If you are not satisfied with your supervisor's response, you may request a meeting with your supervisor and his or her supervisor. If you become dissatisfied with any other aspect of your employment, you may write the Manager in Charge or any member of management. Written complaints will be acknowledged by letter. All complaints will receive prompt attention. Do not register complaints with any representative of the client.
>
> GENERAL ORDERS, Paragraph 18 (page 20): Solicitation and distribution of literature not pertaining to officially assigned duties is prohibited at all times while on duty or in uniform, and any known or suspected violation of this order is to be reported to your immediate supervisor immediately.
>
> REGULATIONS, Paragraph 4 (page 24): While on duty you must NOT: … (p) fraternize on duty or off duty, date or become overly friendly with the client's employees or with co-employees.

Daniel Higgins was employed as a security guard for the Respondent at the Fairmont Hotel. Higgins was the only Guardsmark employee on the day shift. The other security personnel on his shift were employees of the Fairmont Hotel. Higgins was a security dispatcher. His job was primarily to monitor surveillance and related equipment from a security booth, and keep in contact with Fairmont security personnel who patrolled the premises.

Higgins believed that the Fairmont's lead security officer, Gene Saucedo, was making inappropriate racial slurs regarding other Guardsmark and Fairmont employees. On May 5, 2003,[1] Higgins sent a handwritten memorandum to his superiors at Guardsmark and provided a copy to the Fairmont's security director, as follows:

> Mr. Saucedo refers to people of African heritage as: "Johnnies."
>
> On more than one occasion, he has explained to me why he uses the work "Johnnie" to describe a human being of African heritage, however; (sic) I ask you to ask Mr. Saucedo to explain this to you. His words will put this in its proper light.
>
> In the months that I have known Mr. Saucedo, he has used this word to describe, on more than one occasion: [lists seven names, including Latressa Johnson].
>
> Recently, Latressa Johnson was removed from her post. (Guardsmark dispatcher).
>
> Mr. Saucedo explained to me that he approved of her removal because she had made mistakes during her first week on the job.
>
> I realize the Fairmont Hotel soundly endorses Mr. Saucedo's job performance, (i.e., He was recently named "Employees of the Month" and promoted to "Lead Officer") however; (sic) I do not feel Mr. Saucedo should be involved in the "hiring and firing" process of the Security Dept.
>
> I am compiling a list of people who have also heard Mr. Saucedo use the word 'Johnnie" when referring to people of African Heritage. The first name on the list: Larry Grant.
>
> Daniel David Higgins 5/5/03

Higgins testified that prior to preparing this memo he spoke to a Fairmont security officer, Larry Grant, and told him that he, Higgins, was going to complain about Saucedo, as follows:

[1] All dates or time periods hereinafter are within 2003 unless otherwise specified.

> … this had gone far enough, that I didn't think [Saucedo] was the type of individual that should assess, train, evaluate employees, that I didn't think [Saucedo] was fit to be a lead officer for the Fairmont Hotel. And I was going to complain about his use of the word 'Johnnie', because I felt it was a racial slur coded. [2]

Higgins testified that he also spoke to three other Fairmont employees and one Guardsmark employee, Latressa Johnson, about the matter, but there is no further record evidence regarding such conversations. Thus the record remains unclear as to the details of the conversations or whether they took place prior or subsequent to the time Higgins submitted his written complaint.

Apparently in late May, Higgins was summoned to a meeting in the Fairmont's human resources department. Those present on behalf of the Fairmont were the Fairmont's Director of Security, Perry Miller, and two Fairmont human resources representatives, Michelle Gaul and Michelle Bertrand. Those present for the Respondent were two of Higgins' supervisors, Daphne Smith and Emily Fan. The meeting was for the purpose of discussing Higgins' complaint. Higgins testified that the Fairmont human resources representatives questioned him about his complaint. The other participants, according to Higgins, "had very little or nothing to say." Higgins was asked what took him so long to come forward with his complaint, [3] and whether he may have said anything to provoke or entice "any type of racial or bigoted dialogue" from Saucedo. They also asked him who else he would place on his list of witnesses "as time went by." Higgins named other individuals whom he believed had heard Saucedo make similar remarks. Higgins was asked whether he wanted to say anything else, and he said that he believed Saucedo should not hold a lead officer's position. Fairmont Human Resources Representative Michelle Gaul stated that Saucedo was her colleague and it was her job to defend him. Higgins was then asked to leave the meeting.

Higgins testified that on about June 8, 2003, he received a phone call from Daphne Smith. Smith told him that he was being removed from his job at the Fairmont, and explained, according to Higgins, that:

> Michelle Gaul did not like your tone of voice, did not like what you had to say at the meeting about Gene Saucedo, and the next time you're at a similar meeting you need to watch what you say, you don't need to return to the Fairmont, do not return to the Fairmont after this day, do not contact any Fairmont employee, and do not contact any GUARDSMARK employee at the Fairmont.

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[2] Higgins was asked by the General Counsel, "What was Grant's response?" and the Respondent's hearsay objection was sustained. Grant was not called as a witness in this proceeding.

[3] Higgins acknowledges that in April, Saucedo, whom Higgins considered his superior, had lodged some complaints against him for not remaining at his post, leaving his post frequently, and speaking to Fairmont employees in their native languages, and that 'in my final month there" Fairmont Security Director Miller "asked that I tone it down, that I was being too cheerful." Apparently Higgins' complaint against Saucedo was believed by Fairmont human resources personnel to have been precipitated by Saucedo's complaints against him. Higgins acknowledged that he and Saucedo "were having our problems."

Higgins, in an affidavit regarding this conversation states:

> I was working the 7:00 a.m. to 3:00 p.m. shift at the Fairmont Hotel security booth. Daphne Smith called me. She said, Dan, this is Daphne. She said to me something to the effect of, "you asked me to tell you the reason why you were being removed and the reason is because Michelle Gault (sic) felt like you had issued an ultimatum", so the next time something like this happens, you need to watch what you say. When you leave here (the Fairmont) you are not to come back and do not contact the Fairmont employees or the GUARDSMARK employees.

Higgins was not terminated by the Respondent, and initially was offered a graveyard position with another client, which he apparently declined. After about a month he accepted a daytime job with another client of the Respondent.

Smith, an account manager for the Respondent and one of Higgins's supervisors, testified that she told Higgins he was being removed from the Fairmont at the request of Security Director Miller for performance issues that she had discussed with him previously. Explaining this rationale, Smith testified that during the month of May, Higgins was reported for leaving his post unattended and becoming too friendly with some of the other employees by interacting with them outside the security booth instead of monitoring his post. Smith testified that Miller brought these matters to her attention, and that she investigated them by interviewing Higgins and Saucedo. Thereafter, she spoke to Higgins about these matters. According to Smith, Higgins did not deny that he left the security booth; rather, he explained that while talking to other employees he was never out of earshot of the telephone in the security booth.

Emily Fan, Respondent's San Francisco branch manager, testified that Higgins was removed from the Fairmont account because of performance problems, namely, that after having been cautioned by Fan and Smith, he continued to socialize with other employees outside the security booth in a manner that affect his job duties.

Contrary to Higgens' testimony, Smith testified that she did not advise Higgins that his complaint against Saucedo had anything to do with his removal from the Fairmont account. Moreover, she told Higgins that when he left the premises on the day he was removed from the Fairmont account, "he was not to come back and confront anybody at the site, during their work hours. That he's not to go back and confront anybody."

B. Analysis and Conclusions

In analyzing rules of conduct promulgated by employers, the Board requires a reasonable adjustment or balancing of the rights of employers and the Section 7 rights of employees. As the Board has stated in *Lafayette Park Hotel*, 326 NLRB 824 (1998), regarding an employer rule that prohibits employees from "engaging in conduct that does not support the [Employer's] goals and objectives":

> We conclude that the mere maintenance of this rule would not reasonably tend to chill employees in the exercise of their Section 7 rights. In this regard, the rule… addresses legitimate business concerns…We find no ambiguity in this rule as written. Rather, any arguable ambiguity arises only through parsing the language of the rule, viewing the phrase "goals and objectives" in isolation, and

> attributing to the Respondent an intent to interfere with employee rights. We are unwilling to place such a strained construction on the language, and we find the employees would not reasonably conclude that the rule as written prohibits Section 7 activity.

The complaint alleges that the Respondent's handbook contains provisions that inhibit lawful protected concerted activity under the Act. General Orders, Paragraph 5 (supra), contains the following language:

> While on duty you must follow the chain of command and report only to your immediate supervisor. If you are not satisfied with your supervisor's response, you may request a meeting with your supervisor and his or her supervisor. If you become dissatisfied with any other aspect of your employment, you may write the Manager in Charge or any member of management. Written complaints will be acknowledged by letter. All complaints will receive prompt attention. Do not register complaints with any representative of the client.

Inasmuch as the provision does not clarify the language "any other aspect of your employment," a reasonable reading of this language appears to preclude employees from seeking assistance from the Respondent's clients regarding ***all*** aspects of their employment, Precluding employees from contacting and enlisting the assistance of Respondent's clients or customers regarding dissatisfaction with wages, hours or conditions of employment limits employees' protected concerted activities and has been found, in similar circumstances, to be violative of the Act. *Kinder-Care Learning Centers, Inc., 299 NLRB 1171 (1990); Greenwood Trucking, Inc.,283 NLRB 789 (1987)).* Accordingly, I find that the handbook provision prohibiting employees from registering complaints with clients' representatives is violative of the Act as alleged.

It is alleged that General Orders, Paragraph 18 (supra), unlawfully inhibits solicitation and distribution of literature by prohibiting such solicitation and distribution while "in uniform." Respondent's supervisor testified that if employees remove their uniform jacket or cover their uniform with a non-official jacket or covering prior to engaging in solicitation or distribution of literature, they would not be in violation of this provision. It seems that a fair reading of this provision would reasonably put the employees on notice that such activities are permitted when their attire does not denote that they are acting in an official capacity on behalf of the Respondent. The General Counsel argues that the gravamen of this violation is the Respondent's alleged failure to communicate to the employees that their uniforms must be removed or properly covered. The General Counsel does not appear to argue that employees should be permitted to engage in solicitation and distribution activities while in uniform. As noted, I find the provision to be sufficiently clear on its face to advise employees that they should not engage in unofficial business while in uniform. This implies that such activities are permissible provided they are not in uniform; and it seems reasonable to presume that employees, without having to be specifically told, would understand that removing or covering their uniforms will constitute compliance with this provision. I shall dismiss this allegation of the complaint.

It is alleged that Regulations, Paragraph 4 (supra), unlawfully inhibits protected concerted activity by prohibiting "fraterniz[ation] on duty or off duty, dat[ing] or becom[ing] overly friendly with the client's employees or with co-employees." The General Counsel would read this provision broadly to preclude employee meetings or gatherings or discussions for the purpose of engaging in protected concerted activity. I do not agree. This provision must be interpreted in the context of the employees' duties, namely, to insure the protection of

individuals and property. Clearly, the provision is designed to provide safeguards so that security will not be compromised by inter-personal relationships either between Respondent's fellow security guards or between Respondent's security guards and clients' employees. I find that it does not on its face, or by reasonable implication, preclude activities protected by the Act. I shall dismiss this allegation of the complaint.

Regarding the matter of Higgins' removal from the Fairmont account, the Respondent's witnesses denied that Higgins' removal was motivated by his complaint against Saucedo; rather, according to the Respondent, Higgins was removed because of performance problems having nothing to do with his complaint against Saucedo. The only issue raised by the complaint is whether Higgins was removed because he engage in concerted protected activity. This requires a showing that the Respondent knew he was acting in concert with others, and not on his own, in complaining about and seeking Saucedo's demotion for uttering racial slurs.

Assuming *arguendo* that Higgins' testimony should be credited in its entirety, there is nothing Higgins wrote in his memo or said during his subsequent joint interview with representatives of the Respondent and the Fairmont that would have reasonably indicated that his complaint was concerted. I disagree with the General Counsels' argument that the following language in Higgins' memo shows concerted activity:

> I am compiling a list of people who have also heard Mr. Saucedo use the word 'Johnnie' when referring to people of African Heritage. The first name on the list: Larry Grant.

Higgins merely names one employee whom he avers has heard Saucedo make such a remark, but does not state that he is representing or speaking on behalf of this individual and/or others. Further, his memo states, "*I* do not feel Mr. Saucedo should be involved in the 'hiring and firing' process of the Security Dept.," thus seeming to speak on his own behalf in the singular, rather than as an advocate for others. Nor, according to Higgins' testimony, did any representative of the Respondent or the Fairmont, during the course of the interview, either ask Higgins whether he was speaking on behalf of others, or indicate they believed he was speaking on behalf of others. To the contrary, it appears the interviewers believed Higgin's complaint against Saucedo was a reaction to and motivated by Saucedo's recent complaint against Higgins for neglecting his assigned duties, and thus was a personal matter.

The Board requires employer knowledge of concerted activity as a necessary element of proof in such situations. See *Reynolds Electric, Inc.*, 342 NLRB No. 16 (June 30, 2004):

> We assume arguendo that Rice's talking to the Respondent's employees was concerted activity. However, as noted, there is no evidence that the Respondent knew of this concerted activity. Thus, it has not been shown that the Respondent fired Rice in reprisal for his concerted activity. (footnote omitted)

Here, it does not appear that Higgins had engaged in concerted activity; but even assuming *arguendo* that he did, the proof of Respondent's knowledge of such activity is lacking. On the basis of the foregoing, I shall dismiss the complaint allegations pertaining to Higgins.[4]

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) of the Act only as set forth herein.

The Remedy

Having found that the Respondent has violated and is violating Section 8(a) (1) of the Act, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix."

ORDER[5]

The Respondent, Guardsmark, LLC, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining or enforcing a handbook provision prohibiting employees from registering complaints regarding their wages, hours or conditions of employment with Guardsmarks' clients.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

[4] I credit Smith's testimony and find that upon removing Higgins she told him that when he left the premises, "he was not to come back and confront anybody at the site, during their work hours. That he's not to go back and confront anybody." Clearly this admonition was simply a precautionary safeguard to insure that there would be no confrontation, particularly between Higgins and Saucedo and, I find, was not calculated to impede Higgin's Section 7 rights.

[5] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 21 days after receipt of this decision advise its employees, nationwide, that the handbook provision regarding registering complaints with clients is not to be understood as limiting the right of employees to engage in activities protected by the National Labor Relations Act.

(b) At a time when the employee handbook is to be revised or reissued, either delete the handbook provision prohibiting employees from registering complaints with clients, or modify the said language so that it does not prohibit activities protected by the National Labor Relations Act.

(c) Within 14 days after service by the Region, post at its San Francisco, California office copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Regional Office, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: July 28, 2004

Gerald A. Wacknov
Administrative Law Judge

[6] If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain or enforce a provision in our employee handbook that may be reasonably interpreted as prohibiting employees from registering complaints with clients regarding wages, hours or other conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the foregoing rights guaranteed under Section 7 of the Act.

GUARDSMARK, LLC

_____
(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be referred to the Board's office, 901 Market Street-Suite 400, San Francisco, CA 94103. Telephone: (415) 356-5130.